

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>REYNALDO AHUMADA-ONTIVEROS,</b>	§	
<b>Petitioner,</b>	§	
	§	
<b>v.</b>	§	<b>3:13-CV-3955-O-BK</b>
	§	<b>(3:12-CR-0075-O-1)</b>
<b>UNITED STATES OF AMERICA,</b>	§	
<b>Respondent.</b>	§	

**FINDINGS, CONCLUSIONS AND RECOMMENDATION  
OF THE UNITED STATES MAGISTRATE JUDGE**

Petitioner, a federal prisoner, filed a *pro se* motion to vacate sentence under [28 U.S.C. § 2255](#). For the reasons that follow, it is recommended that this action be summarily dismissed.

**I. BACKGROUND**

Petitioner pled guilty to illegal reentry after removal from the United States and was sentenced to 85 months' imprisonment and a one-year term of supervised release. *United States v. Ahumada-Ontiveros*, 3:12-CR-0075-O-1 (N.D. Tex. Sep. 7, 2012), *appeal dismissed based on Anders v. California*, No. 12-10947 (5th Cir. Jun. 18, 2013). In the two grounds raised in this timely [section 2255](#) motion, Petitioner asserts ineffective assistance of counsel at sentencing and on direct appeal. (Doc. 2 at 3-4; Doc. 3 at 6, 12-15).

**II. ANALYSIS**

This [section 2255](#) motion is subject to summary dismissal. "If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party." Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts.

After conviction and exhaustion or waiver of the right to direct appeal, the court presumes that a petitioner stands fairly and finally convicted. See [United States v. Cervantes](#), 132 F.3d 1106, 1109 (5th Cir. 1998) (citing [United States v. Shaid](#), 937 F.2d 228, 231-32 (5th Cir. 1991) (*en banc*)). Under [section 2255](#) a petitioner can collaterally challenge his conviction only on constitutional or jurisdictional grounds. See [United States v. Willis](#), 273 F.3d 592, 595 (5th Cir. 2001).

To establish ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Strickland v. Washington](#), 466 U.S. 668, 687-88 (1984). The same standard applies to a claim of attorney error on appeal. [Smith v. Robbins](#), 528 U.S. 259, 285 (2000).

Petitioner asserts that his trial and appellate counsel failed to challenge the enhancement of his sentence under [United States Sentencing Guideline § 2L1.2\(b\)\(1\)\(A\)\(ii\)](#) based on his state conviction for burglary of habitation. In Texas, a conviction for burglary of a habitation, under [TEX. PEN. CODE § 30.02\(a\)\(1\)](#), constitutes a crime of violence for purposes of enhancement under [U.S.S.G. § 2L1.2](#), while a conviction under [section 30.02\(a\)\(3\)](#) does not because it lacks the element of intent.<sup>1</sup> See [United States v. Morales-Mota](#), 704 F.3d 410, 412 (5th Cir.), *cert.*

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<sup>1</sup> The Texas burglary statute states:

(a) A person commits an offense if, without the effective consent of the owner, the person:

- (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
- (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
- (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

denied, [133 S.Ct. 2374 \(2013\)](#) (collecting cases) (finding burglary of a habitation under [section 30.02\(a\)\(1\)](#) amounts to a crime of violence, which supports enhancement under [U.S.S.G. § 2L1.2](#)); [United States v. Constante](#), 544 F.3d 584, 585-87 (5th Cir.2008) (finding burglary of a habitation under [§ 30.02\(a\)\(3\)](#) does not constitute a crime of violence for purposes of the Armed Career Criminal Act); [United States v. Castro](#), 272 Fed. App'x. 385, 386 (5th Cir. 2008) (*per curiam*) (same under [U.S.S.G. § 2L1.2](#)).

Petitioner contends that his state conviction for burglary of a habitation was under [section 30.02\(a\)\(3\)](#) and, thus, that it does not qualify as a crime of violence. The state indictment, however, charged Petitioner in the conjunctive under both [sections 30.02\(a\)\(1\) and \(a\)\(3\)](#). See Presentence Report (PSR), Doc. 25-1 ¶ 26 in No. 3:12-CR-075-O-1. The indictment reflected the defendant “unlawfully, intentionally, and knowingly entered a habitation without the effective consent of . . . the owner . . . with the intent to commit theft, *and further*, said defendant did intentionally and knowingly enter a habitation without the effective consent of . . . the owner . . . and did then and there commit and attempt to commit theft.” See Attachment I.<sup>2</sup> Thus, contrary to Petitioner’s assertion, [United States v. Francisco Trevino-Rodriguez](#), 463 Fed. App'x. 305, 307-08 (5th Cir. 2012), which involved only a conviction under [section 30.02\(a\)\(3\)](#), is inapposite. (Doc. 3 at 6).

In addition, as reflected in his state judicial confession, Petitioner admitted to committing each allegation contained in the indictment. See Attachment I. The Fifth Circuit has determined

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[TEX. PEN. CODE § 30.02](#).

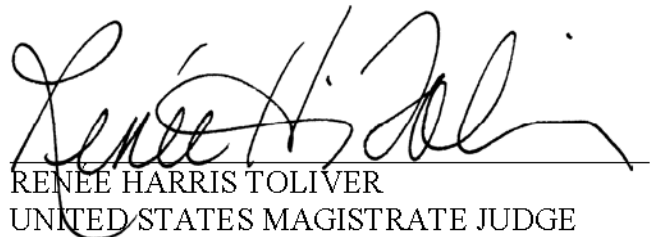
<sup>2</sup> Defendant was convicted of burglary of a habitation under the name of Gustavo Rodriguez. See PSR ¶ 26. The Court takes judicial notice of the state indictment and judicial confession obtained from the Dallas County District Clerk. See Attachment I.

that where a defendant's judicial confession states that he "committed each and every allegation [the indictment] contains," the judicial confession is sufficient to support a finding that the defendant violated all sections listed in the indictment. See [United States v. Valdes](#), 403 Fed. App'x. 885, 893-95 (5th Cir. Dec. 7, 2010). Therefore, because Petitioner pled guilty to violating sections (a)(1) and (a)(3), his trial and appellate counsel were not ineffective in failing to argue that Petitioner's state burglary conviction was not a crime of violence under [U.S.S.G. § 2L1.2](#). See [Estrada-Montalvo v. United States](#), 3:09-CV-2472-P, 2011 WL 3606959 \*2 (N.D. Tex. Aug. 12, 2011) (denying ineffective assistance of counsel's claim because the sentence was properly enhanced based on a state burglary conviction which charged an offense in the conjunctive under both sections (a)(1) and (a)(3)).

### III. RECOMMENDATION


For the foregoing reasons, it is recommended that the motion to vacate sentence under [28 U.S.C. § 2255](#) be summarily **DISMISSED** with prejudice. See Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts.

SIGNED October 28, 2013.

  
RENEE HARRIS TOLIVER  
UNITED STATES MAGISTRATE JUDGE

**INSTRUCTIONS FOR SERVICE AND  
NOTICE OF RIGHT TO APPEAL/OBJECT**

A copy of this report and recommendation will be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. See [28 U.S.C. § 636\(b\)\(1\)](#); [Fed. R. Civ. P. 72\(b\)](#). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. See [Douglass v. United Services Automobile Ass'n](#), 79 F.3d 1415, 1417 (5th Cir. 1996).

  
RENEE HARRIS TOLIVER  
UNITED STATES MAGISTRATE JUDGE

## **ATTACHMENT I**

AA

DEFENDANT Rodriguez, Gustavo W M 05121987 CHARGE BURG HAB  
AKA: GUSTAVO RODRIGUEZ  
ADDRESS 505 W Rochelle #2017, Irving, Tx LOCATION DSO  
FILING AGENCY TX0571500 DATE FILED January 04, 2006 COURT CDCI  
COMPLAINANT Ferrer, Arquimedes F-0636891 VT#: \_\_\_\_\_  
C/C FERNANDO MORALES

TRUE BILL INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS: The Grand Jury of  
Dallas County, State of Texas, duly organized at the January Term, A.D., 2006 of the  
Criminal District Court 1, Dallas County, in said Court at said

Term, do present that one RODRIGUEZ, GUSTAVO, Defendant,

On or about the 27th day of December A.D., 2005 in the County of Dallas and said State, did

unlawfully, intentionally and knowingly enter a habitation without the effective consent of ARQUIMIDES  
FERRER, the owner thereof, with the intent to commit theft,

and further, said defendant did intentionally and knowingly enter a habitation without the effective consent  
of ARQUIMIDES FERRER, the owner thereof, and did then and there commit and attempt to commit theft,

against the peace and dignity of the State.

Bill Hill  
Criminal District Attorney of Dallas County, Texas

William H. Bol  
Foreman of the Grand Jury.

TDC/COURT

AA

DEFENDANT Rodriguez, Gustavo W M 05121987 CHARGE BURGLARY  
 AKA: GUSTAVO RODRIGUEZ  
 ADDRESS 505 W. Rochelle #2017, Irving, Tx LOCATION DSO  
 FILING AGENCY TX0571500 DATE FILED January 04, 2005 COURT CDCI  
 COMPLAINANT Ferrer, Arquimedes F-0636891 VT#: \_\_\_\_\_  
 C/C FERNANDO MORALES

THE STATE OF TEXAS

CAUSE NO. F-0636891

VS.

CRIMINAL DISTRICT COURT  
DALLAS COUNTY, TEXAS

Rodriguez, Gustavo

## JUDICIAL CONFESSION

Comes now Defendant in the above cause, in writing and in open Court, and consents to the stipulation of the evidence in this case and in so doing expressly waives the appearance, confrontation and cross-examination of witnesses. I further consent to the introduction of this Judicial Confession, and testimony orally, by affidavits, written statements of witnesses and other documentary evidence. Accordingly, having waived my Federal and State constitutional right against self-incrimination, and after having been sworn, upon oath, I judicially confess to the following facts and agree and stipulate that these facts are true and correct and constitute the evidence in this case:

On the 27 th day of December A.D., 2005, in Dallas County, Texas, I did unlawfully,

unlawfully, intentionally and knowingly enter a habitation without the effective consent of ARQUIMIDES FERRER, the owner thereof, with the intent to commit theft.

and further, said defendant did intentionally and knowingly enter a habitation without the effective consent of ARQUIMIDES FERRER, the owner thereof, and did then and there commit and attempt to commit theft.

I further judicially confess that I committed the offense with which I stand charged exactly as alleged in the indictment in this cause.

APPROVED BY:

BURR ALANZ  
 Attorney for Defendant

X Gustavo Rodriguez  
 Defendant

SWORN TO AND SUBSCRIBED before me on the 19 day of June, 2007

APPROVED BY:

JIM HAMLIN, CLERK  
 DISTRICT COURTS OF  
 DALLAS COUNTY, TEXAS

Blake B  
 Assistant District Attorney

By [Signature]  
 Deputy District Clerk

Defendant's agreement to stipulate and waiver of confrontation and cross-examination of witnesses are in all things approved by the Court. The above Judicial Confession is hereby approved by the Court.

[Signature]  
 PRESIDING JUDGE

JUDICIAL CONFESSION